

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

FILED
FEB 24 2017

CLERK

MICHAEL EUGENE KOCH,
GUY ALLEN BLESI,
JAMES EDWARD HAYES,
JOSIA JEREMIAH FUERST,
JEFFERY JACOB-DANIEL
KLINGHAGEN,
UNKNOWN MIKE DURFEE STATE
PRISON INMATES,

Plaintiffs,

vs.

DENNIS KAEMINGK, SOUTH
DAKOTA SECRETARY OF
CORRECTIONS; IN HIS INDIVIDUAL
AND OFFICIAL CAPACITY; ROBERT
DOOLEY, WARDEN AT MDSP AND
THE DIRECTOR OF PRISON
OPERATIONS FOR THE SOUTH
DAKOTA DOC; IN HIS INDIVIDUAL
AND OFFICIAL CAPACITY; JOSHUA
KLIMEK, UNIT MANAGER AT MDSP;
IN HIS INDIVIDUAL AND OFFICIAL
CAPACITY; TAMMY DEJONG, UNIT
COORDINATOR AT MDSP; IN HER
INDIVIDUAL AND OFFICIAL
CAPACITY; SUSAN JACOBS,
ASSOCIATE WARDEN AT MDSP; IN
HER INDIVIDUAL AND OFFICIAL
CAPACITY; REBECCA SCHIEFFER,
ASSOCIATE WARDEN AND THE
ADMINISTRATIVE REMEDY
COORDINATOR AT MDSP; IN HER
INDIVIDUAL AND OFFICIAL
CAPACITY; JENNIFER STANWICK,
DEPUTY WARDEN AT MDSP; IN HER
INDIVIDUAL AND OFFICIAL
CAPACITY; MICHAEL DOYLE,

4:15-CV-04103-RAL

OPINION AND ORDER GRANTING
LEAVE TO PROCEED IN FORMA
PAUPERIS ON APPEAL

CORRECTIONAL OFFICER, WITH THE RANK MAJOR, AT MDSP; IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; JEREMY LARSON, CORRECTIONAL OFFICER, WITH THE RANK SERGEANT, AND THE DISCIPLINARY HEARING OFFICER AT MDSP; IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; COREY TYLER, CORRECTIONAL OFFICER, WITH THE RANK SERGEANT, AT MDSP; IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; MICHAEL MEYER, CORRECTIONAL OFFICER AT MDSP; IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; KELLY TJEERDSMA, CORRECTIONAL OFFICER, WITH THE RANK CORPORAL, AT MDSP; IN THEIR INDIVIDUAL AND OFFICIAL CAPACITY; LORI DROTMAN, GENERAL EDUCATION DIPLOMA TEACHER, WHO ALSO IS IN CHARGE OF THE LAW LIBRARY AT MDSP; IN HER INDIVIDUAL AND OFFICIAL CAPACITY; MICHAEL JOE HANVEY, PHYSICIANS ASSISTANT AND HEALTH CARE PROVIDER AT MDSP; IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; ANDRA GATES, NURSING SUPERVISOR AND HEALTH CARE PROVIDER AT MDSP; IN HER INDIVIDUAL AND OFFICIAL CAPACITY; KELLY SWANSON, HEALTH SERVICES SUPERVISOR AT MDSP; IN THEIR INDIVIDUAL AND OFFICIAL CAPACITY; STEPHANIE HAMILTON, NURSE AT MDSP; IN HER INDIVIDUAL AND OFFICIAL CAPACITY; MARY CARPENTER, EMPLOYEE OF THE SOUTH DAKOTA DEPARTMENT OF HEALTH AND ASSISTS WITH INMATE HEALTH CARE DECISIONS FOR INMATES INCARCERATED AT MDSP; IN HER INDIVIDUAL AND OFFICIAL

CAPACITY; BARRY SCHROETER, SUPERVISOR FOR CBM CORRECTIONAL FOOD SERVICES AT MDSP; IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; JENNIFER BENBOON, DIETITIAN EMPLOYED BY CBM CORRECTIONAL FOOD SERVICES; IN HER INDIVIDUAL AND OFFICIAL CAPACITY; CBM CORRECTIONAL FOOD SERVICES, PRIVATE FOR PROFIT COMPANY CONTRACTED BY THE SOUTH DAKOTA DOC TO PROVIDE MEALS TO INMATES INCARCERATED AT MDSP; DELMAR SONNY WALTERS, ATTORNEY AT LAW CONTRACTED BY THE SOUTH DAKOTA DOC TO PROVIDE LEGAL SERVICES TO INMATES INCARCERATED AT MDSP; IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; UNKNOWN DEPARTMENT OF CORRECTIONS EMPLOYEES, CORRECTIONAL OFFICERS EMPLOYED BY THE SOUTH DAKOTA DOC WHO WORK AT MDSP; UNKNOWN DEPARTMENT OF CORRECTIONS HEALTH SERVICES STAFF, HEALTH SERVICES DEPARTMENT STAFF EMPLOYED BY THE SOUTH DAKOTA DOC TO PROVIDE HEALTH CARE FOR INMATES INCARCERATED AT MDSP; AND UNKNOWN CBM CORRECTIONAL FOOD SERVICES EMPLOYEES, EMPLOYEES OF CBM CORRECTIONAL FOOD SERVICES AT MDSP;

Defendants.

A number of plaintiff-inmates filed this lawsuit pursuant to 42 U.S.C. § 1983. Doc. 1. On November 16 and 18, 2016, plaintiffs Jeffery Jacob-Daniel Klinghagen and Michael Eugene Koch moved for review of the denial of their

motions to appoint counsel. Doc. 118; Doc. 120. They also stated that they wished the motions to constitute notices of appeal if they were dismissed. On January 23, 2017, this Court dismissed these motions and ordered that they be treated as notices of appeal. Doc. 139. Neither Klinghagen nor Koch filed a motion for leave to proceed in forma pauperis on appeal or paid their appellate filing fees.

By filing a notice of appeal Klinghagen and Koch consented to the deductions of their initial partial appellate filing fees and the remaining installments from their prisoner accounts. *Henderson v. Norris*, 129 F.3d 481, 484 (8th Cir. 1997). Per *Henderson*, Klinghagen and Koch were supposed to submit copies of their prisoner trust account reports within 30 days of filing their notice of appeal. *Id.* They failed to submit reports. As a result, the initial appellate partial fees must be assessed as “\$35 or such other amount that is reasonable, based on whatever information the court has about the prisoner's finances.” *Id.* In the prisoner trust account report Klinghagen submitted for his original motion for leave to proceed in forma pauperis, he had average monthly deposits of \$66.26. Doc. 47 at 1. In the prisoner trust account report Koch submitted for his original motion for leave to proceed in forma pauperis, he had average monthly deposits of \$52.00. Doc. 40 at 1.

In *Henderson*, the Eighth Circuit set forth “the procedure to be used to assess, calculate, and collect” appellate filing fees in compliance with the PLRA. 129 F.3d at 483. First, the court must determine whether the appeal is taken

in good faith. *Id.* at 485 (citing 28 U.S.C. § 1915(a)(3)). Then, the court must calculate the initial appellate partial filing fee as 20 percent of the greater of:

- (A) the average monthly deposits to the prisoner's account; or
- (B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

28 U.S.C. § 1915(b)(1). Nonetheless, no prisoner will be "prohibited from . . . appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee." 28 U.S.C. § 1915(b)(4).

It appears that both appeals are taken in good faith. Based on the information above, the court finds that § 1915(b)(1) applies. Klinghagen may proceed in forma pauperis on appeal provided he pays an initial partial appellate filing fee of \$13.25, which is 20 percent of \$66.26. Koch may proceed in forma pauperis on appeal provided he pays an initial partial appellate filing fee of \$10.40, which is 20 percent of \$52.00.

Accordingly, it is

ORDERED that Klinghagen may proceed in forma pauperis on appeal. He will make an initial partial appellate payment of \$13.25 by March 23, 2017, made payable to the Clerk, U.S. District Court.

ORDERED that Koch may proceed in forma pauperis on appeal. He will make an initial partial appellate payment of \$10.40 by March 23, 2017, made payable to the Clerk, U.S. District Court.

IT IS FURTHER ORDERED that the institution having custody of the plaintiffs is directed that whenever the amount in their trust account, exclusive

of funds available to them in their frozen account, exceeds \$10, monthly payments that equal 20 percent of the funds credited to the account the preceding month shall be forwarded to the United States District Court Clerk's office pursuant to 28 U.S.C. § 1915(b)(2), until the appellate filing fees of \$505 is paid in full.

Dated February 24, 2017.

BY THE COURT:



ROBERTO A. LANGE
UNITED STATES DISTRICT JUDGE